

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Carlos Jose Barroso
Eapen George

GROUP ART UNIT: 1761

FILED: March 26, 2004

INVENTION: Flavor Selection and
Optimization Process

EXAMINER: Wong, Leslie A.

SERIAL NO.: 10/811,003

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Mail Stop Appeals
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

ATTENTION: Board of Patent Appeals
and Interferences

APPELLANT'S BRIEF (37 C.F.R. § 41.37)

This brief is in furtherance of the Notice of Appeal, filed in this case on December 19, 2007.

Please charge a fee under § 41.20(b)(2) in the amount of \$510.00 for the filing of this Appeal Brief. No other fees are believed to be due. If, however, any fees are required, I authorize the Commissioner to charge these fees to Carstens & Cahoon LLP, Deposit Account No. 50-0392.

35 **I. REAL PARTIES IN INTEREST (37 C.F.R. 41.37(c)(1)(i))**

The real party in interest in this appeal is the following party: Frito-Lay North America, Inc., Incorporated in the state of Texas.

40 **II. RELATED APPEALS AND INTERFERENCES (37 C.F.R. 41.37(c)(1)(ii))**

With respect to other appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in the pending appeal, there are no such appeals or interferences.

45 **III. STATUS OF CLAIMS (37 C.F.R. 41.37(c)(1)(iii))**

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Claims in the application are: 1 - 15.

B. STATUS OF ALL THE CLAIMS IN APPLICATION

- 50 1. Claims pending: 1-15.
2. Claims previously cancelled: None.
3. Claims withdrawn: None.
4. Claims rejected: 1-15.
5. Claims allowed: None.
- 55 6. Claims cancelled in accompanying amendment: None.

C. CLAIMS ON APPEAL

The claims on appeal are: 1-15.

IV. STATUS OF AMENDMENTS FILED AFTER FINAL REJECTION

(37 C.F.R. 41.37(c)(1)(iv))

60 No claims were added, amended or canceled after final rejection.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

(37 C.F.R. 41.37(c)(1)(v))

65 Claim 1 of the invention is directed towards a method for selecting an additive for a food product said method comprising the sequential steps of:

(a) identifying a demographic group (orig. spec., p. 9, line 8);

(b) identifying a plurality of flavor drivers familiar to said demographic group
(orig. spec. p. 10, lns. 3-4);

70 (c) identifying a desired product concept for said food product (orig. spec. p. 10, line 19);

(d) identifying at least one flavor driver as supporting said product concept by
consumer testing of the demographic group (orig. spec. p. 11, lns. 18-20);
and

75 (e) applying the at least one flavor driver identified in step (d) to said food product (orig. spec. p. 12, lns. 9-11).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

(37 C.F.R. 41.37(c)(1)(vi))

1. Claims 1-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Earle, et al.

VII. ARGUMENT

(37 C.F.R. 41.37(c)(1)(vii))

Group 1: Claims 1-4, 8-13, and 15

Claims 1-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Earle, et al.

The prima facie case of obviousness has not been made. To facilitate review, the obviousness analysis should be made explicit. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007). Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007). Furthermore, the Examiner's "findings should clearly articulate which portions of the reference support any rejection. ... Conclusory statements of similarity or motivation, without any articulated rationale or evidentiary support, do not constitute sufficient factual findings." MPEP § 2144.08III. The MPEP instructs that "[i]t is important for an examiner to properly communicate the basis for rejection so that the issue can be identified early and the applicant can be given fair opportunity to reply." MPEP § 706.02(j). Applicants note that the Examiner has failed to indicate where each claim limitation is found in the prior art other than citing large numbers of pages. Consequently, it is quite difficult for the Applicants to respond to such generalized rejections. However, Applicants have endeavored to respond to what they believe are the Examiner's points.

Regarding Claims 1-15, the Office Action states in part:

Earle et al disclose food product development comprising identifying a demographic group (e.g. culture, religion, country), identifying flavors familiar to the groups (e.g. wine, vegetables, cake)

(Office Action mailed April 4, 2007, p. 2)

Applicants assert that the Earle et al reference fails to teach or suggest the limitation of “identifying a plurality of flavor drivers familiar to said demographic group.” An Applicant may be his own lexicographer. MPEP 2111.01IV. In the application the applicants specifically indicate that, “As used herein, a flavor driver comprises a food additive, such as seasoning, that affects the taste and/or smell of a food product.” (Orig. Spec., p. 10, lns. 4-5). The Examiner appears to assert that wine, vegetables, and cake are flavor drivers. Applicants submit that one skilled in the art would not equate a ‘food additive such as a seasoning’ as the same as cake, wine, and vegetables. Applicants provide further discussion of flavor drivers in the application, where applicants state, “Identifying flavor drivers, or reason to believe ingredients familiar to the demographic group can occur in any number of ways including, but not limited to, market research data concerning the foods consumed by the demographic group, surveying restaurants or chefs that work in restaurants that are frequented by the demographic group, surveying a representative sample of the demographic group, or based upon general knowledge of that demographic group.” (Orig. spec., p. 10, lns. 9-15). Applicants are puzzled as to what demographic group ‘wine, vegetables, and cake’ are identified with in the Earle reference. On page 6, lines 17-19 of the Response to Final Rejection dated September 19, 2007, Applicants invited the Examiner clarify this reasoning in any advisory action so that the argument or reasoning could be understood when preparing for appeal. The Examiner declined the invitation.

Applicants further submit that Earle et al fails to teach or suggest the claimed limitation of “identifying a desired product concept for said food product.” On page 10, lines 19-20 of the originally filed specification, the Applicants explicitly define a desired product concept and indicate that, “As defined herein, a desired product concept comprises an implicit or express desired emotional response. For example, a desired product concept for the food product may be

freshness, authenticity, and/or home cooking. This product concept is illustrated visually on a concept board. A concept board comprises images, words, and/or phrases relating to the desired product concept.”

The Examiner asserts that Earle discloses, “identifying a desired concept for product development (e.g. snack foods, sauce).” Again, Applicants are puzzled as to how snack foods or sauce constitute an emotional response. On page 7, lines 7-10 of the Response to Final Rejection dated September 19, 2007, Applicants invited the Examiner clarify this reasoning in any advisory action so that the argument or reasoning could be understood when preparing for appeal. The Examiner declined the invitation.

Applicants further assert that Earle et al fails to teach or disclose the claimed limitation of “identifying at least one flavor driver as supporting said product concept by consumer testing of the demographic group.” The Examiner’s logic is equally confounding on how this claim limitation is found in Earle and the Examiner states this limitation is equivalent to, “using the knowledge obtained to develop a product for the selected demographic group (see pages 194-256 and 317-347, especially pages 213,216,221,222,224,236, Tables 5.10, 5.13, and Figure 5.9).” (Office Action mailed on April 4, 2007, p. 2)

One function of the *prima facie* burden is to require the Patent Office to set forth specific objections, which can be met by the applicant, and not just make general rejections. *In re Epstein*, 32 F.3d 1559, 1570, 31 U.S.P.Q.2d 1817, 1820 (Fed. Cir. 1994) (Plager, J., concurring). “The Examiner cannot sit mum, leaving the applicant to shoot arrows into the dark hoping to somehow hit a secret objection harbored by the Examiner.” *In re Oetiker*, 977 F.2d 1443, 1449, 24 U.S.P.Q.2d 1443, 1447 (Fed. Cir. 1992) (Plager, J., concurring).

It is unclear to Applicants how Earle et al teaches the claimed invention of honing in on a specific flavor driver that supports a product concept. In fact, Applicants submit that Earle et al fails to teach or suggest the limitation of “identifying at least one flavor driver as supporting said product concept by consumer testing of the demographic group.”

The Examiner indicates in the Office Action mailed on April 4, 2007 on page 2 that,

The identification of flavor drivers is obvious to that of Earle et al as all attributes are considered in product development including descriptive sensory analysis (Tables 5.13 and 7.6).

Applicants note that Table 5.13 fails to mention ‘flavor’ let alone a flavor driver. Further, Table 7.6 is simply a table of different sauces. It fails to teach or suggest the claimed limitation of “identifying at least one flavor driver as supporting said product concept by consumer testing of the demographic group.”

The Examiner’s position is that, “It is obvious to use well-known product development techniques to do no more than yield predictable results.” Applicants do not know what ‘result’ Examiner is referring to and asked the Examiner clarify this further in the last paragraph of page 8 in the Response to the Final Office Action dated September 19, 2007 so that it could be addressed on appeal. The Examiner declined the Applicants invitation.

Applicants note that the present application is replete with teachings that, “the objective of the consumer testing is not to find the best tasting food product but to find the food product that provides a link to a product concept or emotional response.” (Orig. Spec., p. 15, lns. 13-14). Thus, Applicants expressly note that “using the consumer testing described above, the best tasting food product may not be the one selected.”

With regard to the Examiner’s assertion that, “The order of events is seen to be no more than a matter of choice and well-within the skill of the art. Applicant states on page

14, lines 16-18, of the specification, that " 'specific sequential order need not be followed.'" (Final Rejection mailed September 19, 2007, p. 3 ¶2). Applicants again vigorously disagree. First of all the Examiner has taken the Applicant's disclosure out of context. The full relevant part of the specification indicates, "Thus, while **Figure 3** depicts the steps in a sequential order, that specific sequential order need not be followed." Clearly it is the steps disclosed in Figure 3 that the Applicant is referencing. Figure 3 is clearly limited and related to consumer testing. Figure 1 best references the claimed sequential method of the present invention. Moreover, Applicants explicitly spell out the steps in the patent application as occurring sequentially. For example, Applicants explicitly state the following:

1. Accordingly, first, a demographic group is identified **110**. (orig. spec. p. 9, ln. 8) (emphasis added)
2. Second, a plurality of flavor drivers familiar to the demographic group selected in the first step **110** are identified **120**. (orig. spec. p. 10, ln. 3) (emphasis added)
3. Third, a desired product concept for the food product is identified **130**. (orig. spec. p. 10, ln. 19) (emphasis added)
4. Returning to **Figure 1**, the fourth step in the overall process comprises identifying, by way of special consumer testing within the desired demographic group, at least one flavor driver that supports the desired product concept **140**. (orig. spec. p. 11, lns. 18-20) (emphasis added).

Consequently, the claimed invention is clearly directed towards an efficient, sequential method to successfully introduce an additive into a food product. It is clear then that the preamble requiring the sequential limitation "breathes life and meaning into the claim." *Kopa v. Robie*, 88 USPQ 478 (CCPA 1951). Earle et al, on the other hand, fails to recognize such an efficient method can be utilized and instead teaches that , "Often these activities are not sequential from consumers to food technologists but they are cycling backwards and forwards between the three groups, as the concepts of the product characteristics identified by the consumers gradually

become the physical and chemical testing of the food technologists.” (Earle, p. 230, Ins. 5-9) (emphasis added).

Secondly, to alleviate any confusion, the claim was amended after the non-final office action to require that the steps occur sequentially. All limitations of the claimed invention must be considered when determining patentability. *In re Lowry*, 32 F.3d 1579, 1582, 32 U.S.P.Q.2d 1031, 1034 (Fed. Cir. 1994). The Examiner cannot ignore the amended claim limitation that the steps occur sequentially. The fact that the claimed order is sequential requires that the prior art teach or suggest the sequential method, which it clearly does not. Consequently, in light of the above, Applicants respectfully request the Examiner withdraw the rejections as to claims 1-15.

The claimed invention may not be dissected into discrete elements to be analyzed in isolation, but must be considered as a whole. See, e.g. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983); *Jones v. Hardy*, 727 F.2d 1524, 1530, 220 USPQ 1021, 1026 (Fed. Cir. 1983) (“treating the advantage as the invention disregards the statutory requirement that the invention be viewed ‘as a whole’”). Further, a reference may be said to “teach away” from the claimed invention when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the references, or would be led in a direction divergent from the path that was taken by the applicant. *In re Gurley*, 27 F.3d 551, 553, 31 U.S.P.Q.2d 1130, 1131 (Fed Cir. 1995). Not only does Earle, et al fail to recognize and teach away from a sequential method, Earle et al discloses what is best described as a different method, namely a top-down approach. A company brainstorms product ideas, with limited consumer input, and then develops a preliminary product (see pages 224-227). Earle et al states:

“They [consumer groups] can develop ideas when little is known about a product area, and investigate the trade-offs the consumers are making. ... Observing the behavior of consumers ... can also generate ideas for new products. ... The consumer groups also screen the new product ideas.” (page 227)

Once the product has proceeded through initial development, the company uses consumer tests and surveys to determine the target market for the new product and which product characteristics to optimize. Earle et al states:

“When more quantitative data are needed, for example in determining the target market and predicting the sales to the target market, a consumer survey using a randomly selected sample of the population is needed. ... Development of the product concept and the product design specifications ... [includes] consumers ... identifying the product attributes important to them in the product.” (pages 228-230)

In contrast, the present invention claims a bottom-up approach. A specific demographic group is chosen, research is done to determine what flavor drivers resonate most with the chosen group, a product concept is developed, and consumers from the chosen group test the product concept. As opposed to first developing a product that will reach a wide market and then choosing where to market it once the product is developed as Earle et al teaches, the claimed invention first determines the specific group and then develops a product tailor made for that group. A person of ordinary skill in the art following the teachings of Earle et al (a top-down approach) would not take the approach presently claimed sequential, bottom-up approach, so the claimed invention is not obvious in view of Earle et al. Applicants submit that because of these different approaches, when the presently claimed invention is view as a whole, it is unobvious in view of Earle et al. Consequently, for at least this reason, Applicants respectfully request the Examiner withdraw the rejection as to claims 1-15.

Group II: Claim 5

The examiner also fails to cite to the portion of Earle et al that discloses or teaches

several elements of claim 5. To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. MPEP 2143.03. It is important for an Examiner to properly communicate the basis for a rejection so that the issues can be identified early and the applicant can be given fair opportunity to reply. MPEP 706.02(j). Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it. MPEP 707.07(f). On pages 11-12 of the Response to Final Office action dated September 19, 2007, Applicants invited the Examiner to explain where Earle et al teach the limitations of smelling said food product or the limitation of comparing said response to said product with a plurality of qualities shown on a concept board of the limitation of rating said flavor driver to provide a match with said desired product concept. The Examiner declined the invitation. Consequently, because all claim limitations are not taught or suggested by Earle et al, Applicants respectfully request the Board overturn the Examiner as to claim 5.

Group III: Claim 6

The examiner also fails to cite to the portion of Earle et al that discloses or teaches several elements of claim 6. The examiner also fails to cite to the portion of Earle et al that discloses or teaches several elements of claim 5. To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. MPEP 2143.03. It is important for an Examiner to properly communicate the basis for a rejection so that the issues can be identified early and the applicant can be given fair opportunity to reply. MPEP 706.02(j). Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it.

MPEP 707.07(f). On page 12 of the Response to Final Office action dated September 19, 2007, Applicants invited the Examiner to explain where Earle et al teach the limitations of rating the food product for an emotional response. The Examiner declined the invitation. Consequently, because all claim limitations are not taught or suggested by Earle et al, Applicants respectfully request the Board overturn the Examiner as to claim 6.

Group IV: Claim 7

Examiner also fails to cite to the portion of Earle et al that discloses or teaches several elements of claim 7. The examiner also fails to cite to the portion of Earle et al that discloses or teaches several elements of claim 7. To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. MPEP 2143.03. It is important for an Examiner to properly communicate the basis for a rejection so that the issues can be identified early and the applicant can be given fair opportunity to reply. MPEP 706.02(j). Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it. MPEP 707.07(f). On pages 11-12 of the Response to Final Office action dated September 19, 2007, Applicants invited the Examiner to explain where Earle et al teaches the use of a flavored oil as a flavor driver that supports a product concept. The Examiner declined the invitation. Consequently, because all claim limitations are not taught or suggested by Earle et al, Applicants respectfully request the Board overturn the Examiner as to claim 7.

Group V: Claim 14

Examiner also fails to cite to the portion of Earle et al that discloses or teaches several elements of claim 14. The examiner also fails to cite to the portion of Earle et al that discloses or

teaches several elements of claim 14. To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. MPEP 2143.03. It is important for an Examiner to properly communicate the basis for a rejection so that the issues can be identified early and the applicant can be given fair opportunity to reply. MPEP 706.02(j). Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it. MPEP 707.07(f). On page 12 of the Response to Final Office action dated September 19, 2007, Applicants invited the Examiner to explain where Earle et al teaches the use of an illustration or a description of at least one reason to believe ingredient. The Examiner declined the invitation. Consequently, because all claim limitations are not taught or suggested by Earle et al, Applicants respectfully request the Board overturn the Examiner as to claim 14.

CONCLUSION

In view of the above arguments, Appellant respectfully submits that all the extant claims are allowable over the cited prior art and that the application is in condition for allowance.

Accordingly, Appellant respectfully requests the Board of Patent Appeals and Interferences to overturn the rejections set forth in the Final Office Action.

Date: February 4, 2008



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Chad Walter
Reg. No. 54,625
Carstens & Cahoon, LLP
PO Box 802334
Dallas, TX 75380
(972) 367-2001
Attorney for Applicant

VIII. CLAIMS APPENDIX
(37 C.F.R. 41.37(c)(1)(viii))

The following is a complete listing of the claims currently pending in the application:

1. (Previously Presented) A method for selecting an additive for a food product said method comprising the sequential steps of:
 - (a) identifying a demographic group;
 - (b) identifying a plurality of flavor drivers familiar to said demographic group;
 - (c) identifying a desired product concept for said food product;
 - (d) identifying at least one flavor driver as supporting said product concept by consumer testing of the demographic group; and
 - (e) applying the at least one flavor driver identified in step (d) to said food product.
2. (Original) The method of claim 1 wherein said demographic group is defined by a statistical characteristic selected from the group consisting of age, race, sex, income, net worth, marital status, religion and educational attainment of one or more combinations thereof.
3. (Original) The method of claim 1 wherein said flavor drivers are identified by consulting chefs familiar with said demographic group.

4. (Original) The method of claim 1 wherein said desired product concept is visually represented by a concept board.

5. (Original) The method of claim 1 wherein step (d) is accomplished by a consumer test using a concept board, said consumer test comprising the steps of:

- (1) smelling said food product;
- (2) tasting said food product to solicit a response to the product;
- (3) comparing said response to said product with a plurality of qualities shown on a concept board;
- (4) rating said flavor driver to provide a match with said desired product concept.

6. (Original) The method of claim 5 wherein the rating of said food product at step 4 comprises rating the food product for an emotional response.

7. (Original) The method of claim 1 wherein said flavor drivers are applied at step (c) with a flavored oil.

8. (Original) The method of claim 1 wherein said food product comprises a snack food.

9. (Original) The method of claim 8 wherein said snack food comprises a starch based substrate.

10. (Original) The snack food of claim 9 wherein a starch from said starch-based substrate is derived from the cereal group consisting of amaranth, barley, buck wheat, corn, millet, oats, rice, rye, sorghum, and wheat or one or more combinations thereof.
11. (Original) The snack food of claim 9 wherein a starch from said starch-based substrate is derived from a legume group consisting of beans, peas, and lentils or one or more combinations thereof.
12. (Original) The snack food of claim 9 wherein a starch from said starch-based chip substrate is derived from the tubers group consisting of arrowroot and potatoes or one or more combinations thereof.
13. (Original) The method of claim 1 further comprising the step of:
 - f) displaying at least one image or phrase relating to said product concept for product marketing.
14. (Original) The method in claim 13 wherein said image further comprises an illustration or a description of at least one reason to believe ingredient.
15. (Original) A food product selected by the method of claim

IX. EVIDENCE APPENDIX

There is no supplemental evidence presented with this appeal.

X. RELATED PROCEEDINGS APPENDIX

There are no proceedings related to this application.